Consolidated's representations, Sprint has never represented that Sprint will be the party providing the customer service, billing, marketing and sales, or installation functions for the end user subscribers. In fact, Sprint has consistently been very clear that TWC, not Sprint, will be performing those functions. The point is that the bulk of Consolidated's argument is centered on a retail/wholesale distinction that simply does not exist under the law, as explained below.

B. The D.C. Circuit Court and Several State Commissions have Rejected the Retail/Wholesale Distinction on which Consolidated Relies

While it is not clear that the 1999 D.C. Circuit Court decision *Virgin Islands Telephone Corporation v FCC*[10] is controlling here, it clearly rejects the wholesale/retail argument espoused by Consolidated.

In *Virgin Islands Telephone*, the FCC granted AT&T-SSI cable landing rights as a noncommon carrier. Virgin Islands Telephone Corporation appealed the decision to the D.C. Circuit Court of Appeals, arguing that the FCC misapplied the 1996 Act when it found that AT&T-SSI need not be regulated as a common carrier under the Act.[11] Although Virgin Islands Telephone Corporation maintained that the 1996 Act had substantially altered the definition of common carrier, the FCC applied the definition of "common carrier" set forth in *National Association of Regulatory Utility Commissioners v. FCC*[12] ("NARUC I") and concluded that ATT-SSI was a private carrier for purposes of its cable landing operations.

The D. C. Circuit emphasized that it was required to defer to the FCC unless its interpretation of common carrier was unreasonable. In holding that the FCC acted within its broad discretion in applying the NARUC I test, the D.C. Circuit did not explain how the NARUC I test fit the language in the Act that defines telecommunications carrier as an entity that offers "telecommunications for a fee directly to the public, *or to such classes of users as to be*

[10] 198 F.3d 921 (D.C. Cir. 1999) (hereinafter, "*Virgin Islands Telephone*").
[11] *Id.* at 922.
[12] 525 F.2d 630 (1976) ("NARUC I"). This case predates the adoption of the Act.

effectively available directly to the public, regardless of the facilities used," particularly the second prong of the definition. The Court did note, however, that the FCC's consideration of "whether a service is effectively available directly to the public depends on the type, nature, and scope of users for whom the service is intended and whether it is available to 'a significantly restricted class of users.'"[13] The FCC found that AT&T-SSI was not offering its service to the general public because it:

> will make available bulk capacity in its system to a significantly restricted class of users, including common carrier cable consortia, common carriers, and large businesses. Potential users are further limited because only consortia, common carriers, and large businesses with capacity in interconnecting cables or other facilities and, in many cases, operating agreements with foreign operators, will be able to make use of the cable as a practical matter.[14]

Importantly, however, the *Virgin Islands Telephone* Court declined to rest its decision on any retail/wholesale distinction:

> [t]he term 'telecommunications service' was not intended to create a retail/wholesale distinction . . . neither the Commission nor the courts . . . (have construed) 'the public' as limited to end-users of a service . . . the Commission never relied on a wholesale-retail distinction; the focus of its analysis is on whether AT&T-SSI offered its services indiscriminately in a way that made it a common carrier . . . and *the fact that AT&T-SSI could be characterized as a wholesaler was never dispositive.*[15]

The Iowa Utilities Board (IUB), which Consolidate cites specifically rejected the retail/wholesale distinction.[16] The IUB expressly stated that "[t]he Board agrees that the FCC and the Virgin Islands Court did *not* adopt a wholesale/retail distinction in interpreting the language of the statute."[17]

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[13] *Virgin Islands Telephone* at 924.

[14] *Id.*

[15] *Id.* at 929 (emphasis added).

[16] See p. 5 of Consolidated's Response where Consolidated inaccurately describes the situation in Iowa. The rural ILECs in Iowa did not refuse to negotiate because they were rural. They refused to negotiate with Sprint because Sprint was not serving the end-user. This is the very argument the IUB rejected.

[17] *Order Granting Motion to Dismiss*, Docket No. ARB-05-2, issued May 26, 2005, p. 13 (emphasis added). The case has since been remanded from Federal Court. The IUB decision on reconsideration is expected to be issued soon.

1. There Are Key Differences Between The Submarine Cable Service Offered In The *Virgin Islands Telephone* Case And The Interconnection And Other Services Sprint Proposes To Offer.

There are key differences between the submarine cable service that AT&T-SSI offered in *Virgin Islands Telephone*, and the telecommunications services Sprint proposes to offer with TWC. AT&T-SSI's offering involved the provisioning of a submarine cable – a simple conduit. The *Virgin Islands Telephone* case did not address how the submarine cable would interconnect with local carriers for the purpose of exchanging traffic to and from the PSTN.

In contrast, Sprint is not simply selling bulk capacity, but instead will be solely responsible for all of the elements of interconnection. These elements include, among other things, the routing of calls, provisioning of interconnection trunks and provisioning of telephone numbers. Sprint will provide both the conduit and the switching and routing functions. In holding that Sprint was a telecommunications carrier under a business model identical to that at issue here, the Illinois Commerce Commission recognized the distinction between Sprint's services and AT&T-SSI's services in *Virgin Islands Telephone*:

> The Commission also notes that we previously analyzed the *Virgin Islands* decision in *SCC* and found *Virgin Islands* to be factually dissimilar. In *SCC*, the Commission stated AT&T-SSI failed to meet either prong of the NARUC I test, as its main service was to "provide hardware, lay cable and lease space to cable consortia, common carriers and large businesses with the capacity to interconnect to its proposed cable on an individualized basis." *SCC* at 8. Essentially, SCC was providing bulk capacity. We believe this distinction is relevant to this proceeding as well. *Here, Sprint is not offering bulk capacity. It is offering a host of technical functions, including 9-1-1 provisioning services, to any entity that provides its own "last mile" facilities.*[18]

Accordingly, Sprint's business model is different from the arrangement at issue in the *Virgin Islands Telephone* case. Given those differences, *Virgin Islands Telephone* is of limited utility. Indeed, as noted, the D.C. Circuit did not analyze the key statutory language at issue here, "effectively available directly to the public," but instead simply deferred to the FCC's choice to apply the NARUC I test without ever explaining how that test satisfied the statutory

[18] Exhibit 1 at p. 13.

language. While such deference may have been appropriate on the particular facts presented in *Virgin Islands Telephone*, the facts here are markedly different and the FCC has never indicated that NARUC I test should apply in the factual context here.

In any event, as explained below, although the NARUC I test is of doubtful applicability, Sprint satisfies that test.

C. Sprint Satisfies The NARUC I Test.

While emphasizing the D.C. Circuit's analysis of the NARUC I test in the 1999 *Virgin Islands Telephone* case, in its 2002 *USTA* decision, the D.C. Circuit explained the application of NARUC I to make clear that Sprint satisfies that test on the facts here. As articulated by the D.C. Circuit in *United States Telecom Association v. FCC*[19] (*"USTA"*), common carrier status under the two-prong test established in *NARUC I* "turns on:

- whether the carrier holds 'himself out to serve indifferently all potential users'; and,
- whether the carrier allows the customers to transmit intelligence of their own design and choosing."[20]

USTA involved a state telecommunications network in Iowa that had applied for Universal Service support under Section 254 of the Act. The D.C. Circuit examined whether a restricted audience for a carrier's service would exclude that carrier from common carrier or telecommunications carrier status. The United States Telecom Association argued:

> because Iowa law greatly restricts the universe of the network's authorized users, ICN fails to satisfy the first prong of the common carrier test: that the carrier hold itself out to serve indifferently "all potential users." . . . [and that] a carrier cannot satisfy this prong unless it holds itself out to "the public." *See NARUC I, 525 F.2d at 640.* And ICN's "class of legally authorized users," USTA maintains, "is not broad enough to be considered a portion of 'the public.'"[21]

Rejecting the USTA's argument, the FCC held that Iowa's state Communications

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[19] 295 F.3d 1326 (D.C. Cir.2002)
[20] *USTA* at 1329.
[21] *Id.* at 1332.

Network ("ICN") was a telecommunications carrier based on the *NARUC I* two-prong test. The Court agreed with the FCC, noting that "*NARUC I* can be read as approving the general rule that a carrier offering its services only to a legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class."[22] The key factor "is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use."[23]

USTA also examined the second prong of the *NARUC I* test for common carrier status—"whether the carrier allows the customers to transmit intelligence of their own design and choosing."[24] This prong essentially mirrors the definition of "telecommunications" in the Act.[25] The Court stated that this prong of the test is intended to confine common carrier status to operators that do not regulate the content of their customers' communications.[26]

Sprint satisfies both prongs of the *NARUC I* test, as more fully described below.

1. Sprint Offers Its Services Indifferently To All Within The Class Of Users Consisting of TWC And All Other Entities Who Desire The Services And Who Have Comparable "Last Mile" Facilities.

Sprint satisfies the first prong of the *NARUC I* test because Sprint offers its services indifferently to all within the relevant class of users. Sprint intends to offer its interconnection services, including those services previously listed, to all entities that are similarly situated to TWC, meaning all entities who desire to take them and who have comparable 'last mile' facilities to the cable companies. Indeed, Sprint has actively sought relationships with numerous cable companies, including attending several trade shows from 2003 through 2005 for the purpose of conveying to as many cable companies as possible that Sprint was interested in

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[22] *Id.* at 1333.
[23] *Id.* at 1333.
[24] *Id.* at 1329.
[25] Section 153(43) of the Act defines "telecommunications" as the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received.
[26] *USTA* at 1335.

forming relationships to provide competitive voice services. Sprint has held discussions with all of the top 10 cable companies, and a majority of the next 34 largest cable companies. As a result, Sprint has seen considerable success working with cable companies, and has publicly announced agreements with several cable companies in addition to TWC, including (among others) Wide Open West, Time Warner Cable, Wave Broadband, and Blue Ridge Communications, covering more than 18 states serving over 30 million households. Accordingly, there can be no doubt that Sprint offers its services indifferently to this class of users.

Furthermore, Sprint has a marketing brochure that is targeted to cable companies, which is publicly available on Sprint's web site at http://www.sprint.com/business. The purpose of the brochure is to introduce these companies to the breadth of services Sprint makes available to them. The brochure contains a long list of both telecommunications services and non-telecommunications services that Sprint makes available to cable companies and other similarly situated companies. Sprint also has a "template" contract that it makes available as a starting point for a contractual relationship with interested potential purchasers. The marketing brochure and the template contract clearly demonstrate that Sprint makes the same offer to all companies who could use the services. In addition, Sprint has demonstrated its commitment to offer its services to all cable companies or similarly situated entities by filing a tariff for its local interconnection services. Clearly, Sprint is offering its services indifferently to all within the class of users (cable companies and other similarly situated entities) who could avail themselves of the services.

2. Sprint Makes The Same Offer Available To All Similarly Situated Companies Indifferently, But Each Contract Reflects The Particular Mix Of Services Purchased.

Consolidated apparently believes that Sprint cannot be offering its services indifferently to all potential takers because Sprint has a contract with TWC that Sprint did not wish to provide absent appropriate protections in place to protect the highly confidential and competitively

sensitive information contained in that agreement. Such terms include launch dates and pricing. If disclosed, this information would provide Consolidated invaluable insight into the business of perhaps the only wireline competitor to Consolidated. It was unreasonable for Consolidated to expect Sprint to produce the agreement without restriction.[27] Moreover, Sprint may offer its services pursuant to contracts with its customers that accommodate the particular needs of that customer. Indeed, the Court in *Qwest Communications Corp. v. City of Berkeley*[28] held that a carrier may supplement its generic offerings with offerings that are designed to meet the needs of a particular customer or limited number of customers without violating the unreasonable discrimination prohibition if that carrier makes that more customized offering available to anyone who might find it useful and the offering is not otherwise unlawfully discriminatory."[29] In addition, the *Qwest* court case stated that just because the contract at issue "resulted from a competitive bidding process and contemplates tailored services does not mean that Qwest intends to offer non-common carrier services."[30] (Emphasis supplied) The emphasis in *Qwest* case is on the offering of the services, not the contract that results from the offering.

While each company may choose to purchase different services (or different combinations of services) from Sprint, each company is offered the same array of services, including both telecommunications services and non-telecommunications services, from which to choose. Each company will likely choose different services or bundles of services from Sprint. That does not mean that each company does not receive the same offer. Under the *NARUC I* test, as articulated by the *USTA* case discussed above, the discrimination issue is governed by how the services are offered, not the terms and conditions of the agreement that results from the offer.

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[27] See Exhibit A to Consolidated's Response to Motion for Consolidation, Motion to Dismiss, et al filed in Docket 31577 and 31578.
[28] 146 F.Supp.2d 1081 (N.D. Cal. 2001).
[29] *Id.* at 1096.
[30] *Id.*

It is out of necessity, not discrimination, that each of Sprint's contracts with a cable company reflects the particular mix of services the company is purchasing from Sprint. Further, the services Sprint offers consist of both telecommunications services and non-telecommunications services. Different companies may purchase different combinations of services, which would affect the terms, conditions, and pricing. Sprint has multiple contracts with cable companies. These cable companies operate in as many as 16 states or as few as 1 state, ranging from 11 million potential subscribers to 13,000 potential subscribers, which again would affect the pricing each company receives from Sprint. Other specific circumstances that would affect a company's pricing are the number of telecommunications services and non-telecommunications services being purchased, the number of minutes purchased, and variable interconnection costs which take into account the distance between Sprint's network and the networks of the rural ILECs. It would be over-simplistic, not to mention unrealistic, to suggest that each cable company should have the same agreement, regardless of the services being purchased.

Finally, what Sprint is doing with the cable companies is no different from the custom service agreements into which telecommunications carriers commonly enter with each other for the provision of telecommunications services. For example, Sprint's ILEC entity has contracts with interexchange carriers to provide access services to those carriers, and those contracts reflect the agreed-upon rates and other terms and conditions of the particular circumstances. There is no authority for the proposition that the existence of a custom service agreement means that the providing carrier is not providing a telecommunications service, or that the carrier is not a telecommunications carrier under the Act merely because it provides services pursuant to a contract. Likewise, the fact that Sprint has different contracts with the cable companies does not mean that Sprint is not a telecommunications carrier within the meaning of the Act.

3. Sprint Will Not Alter The Content Of The Voice Communications By End Users.

Sprint satisfies the second prong of the *NARUC I* test because Sprint does not alter the content of the voice communications between end users. The message/voice that is spoken on one end is the message/voice that is heard on the other end. Accordingly, to the extent the *NARUC I* test has any bearing on the definition of a telecommunications carrier, Sprint satisfies that test.

D. Because Sprint is a Telecommunications Carrier Regardless of Whether It "Directly" Serves the End-User, it is Entitled to Interconnect with Brazos and Similarly Situated Companies Under Section 251(a) and to Receive the Benefits of Section 251(b)

Sprint is entitled to interconnect with other telecommunications carriers under section 251(a) of the Act. The general requirement imposed on *all* carriers to interconnect "directly or indirectly" in §251(a) of the Act is not superseded by the more specific obligation imposed on *ILECs only* in §251(c)(2) to interconnect at technically feasible points, such an assertion was recently rejected by the Tenth Circuit in *Atlas Telephone Company, et al. v. Oklahoma Corporation Commission.*[31] In *Atlas Telephone*, a CMRS carrier sought an interconnection agreement and a reciprocal compensation arrangement with several RLECs in Oklahoma even though the CMRS carrier intended to interconnect with the RLECs only indirectly.[32] The CMRS carrier intended to use an IXC (Southwestern Bell Telephone Company or "SWBT") to interconnect with the RLECs.

Unlike Sprint in the present case, the IXC in *Atlas Telephone* was not providing interconnection and telecommunications services to the CMRS carrier, but was transporting local traffic to and from the RLECs and the CMRS carrier.[33] Although the factual scenario in *Atlas Telephone* was similar to the present case, SWBT did not seek an interconnection agreement

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[31] *Atlas Telephone Co., et al. v. Oklahoma Corp. Comm'n, et al.*, 400 F3d 1256, 1265 (10th Cir. 2005).
[32] *Id.* at 1259-62.
[33] *Id.*

with the RLECs and was not seeking to track, report, receive and pay reciprocal compensation. Nevertheless, RLECs in *Atlas Telephone* attempted to argue that the requirements in §251(c) trump the general requirement to interconnect "directly or indirectly" set forth in §251(a) of the Act.

The court, however, rejected the RLECs' contentions, noting that it simply found "no support for this argument in the text of the statute or the FCC's treatment of the statutory provisions."[34] The court reasoned that the interconnection requirements set forth in §251(c)(2) extended only to incumbent LECs, and only when another carrier makes a specific request under that section of the Act.[35] Rejecting the RLECs' efforts to argue that interconnection with them was controlled solely by §251(c), the court stated:

> Yet, as noted above, the obligation under § 251(c)(2) applies only to the far more limited class of ILECs, as opposed to the obligation imposed on all telecommunications carriers under § 251(a). The RTCs' interpretation [of Section 25(c)(2)] would impose concomitant duties on both the ILEC and a *requesting* carrier. This contravenes the express terms of the statute, identifying ILECs as entities bearing additional burdens under § 251(c). We cannot conclude that such a provision, embracing only a limited class of obligees, can provide the governing framework for the exchange of local traffic.[36]

Moreover, the *Atlas Telephone* court concluded that the RLECs' assertion was contrary to the purposes of the Act. Although §251(c) interconnection is triggered only upon request by a requesting carrier, the court observed that the RLECs' assertion would make such interconnection obligatory to all carriers seeking to exchange local traffic. Noting also that at the same time the Act exempts rural telephone companies from application of 251(c) until action by state commissions to lift the rural exemption, the court concluded:

> If Congress had intended § 251(c)(2) to provide the sole governing means for the exchange of local traffic, it seems inconceivable that the drafters would have simultaneously incorporated a rural exemption functioning as a significant barrier to the advent of competition.[37]

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[34] *Id.* at 1265.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 1265-66, *citing,* 47 U.S.C. § 251(f)(1)(A).

Accordingly, since Sprint is a telecommunications carrier Brazos and the similarly situated rural ILECs must provide interconnection pursuant to §251(a) of the Act and fulfill their obligations to Sprint under section 251(b). There is simply no support for Consolidated's claims that Sprint is not entitled to those items contained in section 251(b) including but not limited to dialing parity, reciprocal compensation, number portability either because it does not "directly" serve the end-user or that the interconnection will be used to allow consumers to make and receive calls that happen to use IP technology. With respect to number portability, it should be noted that the FCC has held that a LEC has a duty to provide number portability to other telecommunications carriers, which as demonstrated above Sprint qualifies, "regardless of the facilities used." Specifically, the FCC stated in its First Report and Order and Further Notice of Proposed Rulemaking in CC Docket 95-116, FCC 96-286 released July 2, 1996:

> 8. The 1996 Act defines the term "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)."[38] The term "telecommunications service" is defined by the 1996 Act as "the offering of telecommunications for a fee directly to the public, **or to such classes of users as to be effectively** available directly to the public, **regardless of the facilities used.**"[39] Because the 1996 Act's definition of number portability requires LECs to provide number portability when customers switch from any telecommunications carrier to any other,[40] **the statutory obligation of LECs to provide number portability runs to other telecommunications carriers**.

In addition, Consolidated's claims and concerns that the "carrier's carrier" has no contractual relationship with the end-user are misplaced. Sprint is under contract to provide LNP based upon regulatory rules and guidelines to the carrier offering telecommunications directly to the

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[38] *See* 47 U.S.C. § 153(44).

[39] *See* 47 U.S.C. § 153(46). The term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[40] *See* 47 U.S.C. § 153(30).

public. Moreover, Sprint's interconnection agreement with Consolidated addresses service provider number portability. Sprint is willing to address any concerns regarding porting in the interconnection agreement and eager to begin discussions on the trading partner profile Sprint uses to establish porting. Moreover, Sprint intends to abide by all rules and regulations in this regard.

Finally, Consolidated's claim that the Commission should not and cannot enforce an interconnection agreement that would be used to allow IP enabled calls to be delivered is without merit and simply highlights the true motive – that is to delay the availability of IP enabled voice services in rural areas – delay neither the FCC, Congress or the State of Texas endorses. The FCC has made it very clear that it wishes to enable rapid deployment of IP-enable services to benefit American consumers. In CC Docket 99-200, FCC 05-20 released February 1, 2005, the FCC granted a waiver to SBCIS (a VoIP provider) to obtain numbering resources with a requirement to process porting requests and to be in compliance with the numbering requirements. Paragraph 4 of that same order also supports the implementation of IP-enabled services, like VoIP, that interconnect to the PSTN as follows:

> Allowing SBCIS to directly obtain numbers from the NANPA and the PA, subject to the conditions imposed in this order, will help expedite the **implementation of IP-enabled services that interconnect to the PSTN; and enable SBCIS to deploy innovative new services and encourage the rapid deployment of new technologies and advanced services that benefit American consumers. Both of these results are in the public interest**[41] (Emphasis supplied.)

In addition to the above, the FCC made it clear that its jurisdictional determination of or regulatory treatment of particular retail IP-enabled services had no impact on the underlying facilities on which the retail service rides. Specifically, the FCC responded to a letter from the

[41] *See IP-Enabled Services NPRM*, 19 FCC Rcd at 4865 (recognizing the paramount importance of encouraging deployment of broadband infrastructure to the American people).

Association for Local Telecommunications Carriers expressing concern that "[r]egardless of the regulatory classification of retail IP-enable services themselves, the Commission must ensure the continued viability of the local competition framework established by Congress in Sections 251 and 271 of the Act."[42]

E. Several State Commissions Have Considered Identical Issues And Have Held That Service Providers Requesting Interconnection Under Similar Business Models Are Telecommunications Carriers And Are Entitled To Interconnection Under The Act.

The Illinois Commerce Commission, the New York Public Service Commission, and the Public Utility Commission of Ohio have all held that a service provider that provides PSTN interconnection and other similar services to cable companies is entitled to interconnect with rural LECs under §251(a). True and correct copies of the Illinois, New York, and Ohio orders are attached hereto as Exhibits 1, 2, and 3, respectively. In addition, in a recent Illinois arbitration case between Sprint and three Illinois RLECs where evidence was introduced and considered as to whether Sprint qualified as a telecommunications carrier, the administrative law judges recently released their Proposed Arbitration Decision and ruled in favor of Sprint under the same facts at issue here. A copy of the Proposed Arbitration Decision is attached hereto as Exhibit 4.

In Illinois, Sprint requested negotiation of an interconnection agreement with several rural LECs in order to provide services in conjunction with MCC Telephony of Illinois's ("MCC Illinois") offering of competitive local voice service in the rural LECs' territory. The business model at issue in Illinois is virtually identical to the one here. Just as here, the rural LECs in the Illinois case argued in a declaratory ruling action that they had no duty to interconnect with

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[42] See *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, fn 155 and Letter from Jason D. Oxman, General Counsel, Association for Local Telecommunications Services, to Marlene Dortch, Secretary, WC Docket Nos. 04-29, 04-36 (filed Nov. 2, 2004).

Sprint. In its Order dated July 13, 2005, the Illinois Commerce Commission ("ICC") firmly rejected the rural LECs' argument, holding that Sprint was a telecommunications carrier, as follows:

> The Commission finds that Sprint is a common carrier/telecommunications carrier. While Sprint does not offer its services directly to the public, it does indiscriminately offer its services to a class of users so as to be effectively available to the public, meaning it provides services to those capable of providing their own "last mile" facilities.[43]

The ICC recognized the distinction between "directly to the public" and "effectively available directly to the public," the critical point that Consolidated ignores. In addition, in its analysis the ICC compared Sprint's case to a similar situation involving a 911 carrier, and expressly held that Sprint offers it services indiscriminately:

> In *SCC*, the Commission concluded that SCC, a 9-1-1 and emergency services provider, was a common carrier even though it provided its services directly to ILECs, CLECs, certain State agencies, wireless operators, emergency warning systems and emergency roadside assistance programs. The Commission reached this conclusion even though SCC did not directly serve the general public. The key was the fact that SCC made its services indiscriminately available to those who could use its services. SCC at 8. *In the instant docket, we conclude that Sprint also makes its services indiscriminately available to those who could use its services.*[44] (Emphasis added.)

The ICC also acknowledged that Sprint satisfied the second prong of the *NARUC I* test, noting that "Sprint also passes the second prong of the *NARUC I* test by not altering the content of voice communications by end users."[45]

Another state commission, the New York Public Service Commission ("NYPSC") likewise held that Sprint is a telecommunications carrier under these circumstances. In its May 24, 2005 Order Resolving Arbitration Issues, the NYPSC ruled that the term "end users" as used in the interconnection agreement should include TWC's subscribers, and therefore Sprint was entitled to interconnection under §251(a):

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[43] Exhibit 1 at p. 12.
[44] Exhibit 1 at pp. 12-13.
[45] Exhibit 1 at p. 12.

> Sprint's agreement to provide Time Warner Cable with interconnection, number portability order submission, intercarrier compensation for local and toll traffic, E911 connectivity, and directory assistance, for Time Warner to offer customers digital phone service, meets the definition of "telecommunications services." Sprint's arrangement with Time Warner *enables it to provide service directly to the public.* . . . Sprint meets the definition of 'telecommunications carrier" and, therefore, is entitled to interconnect with the independents pursuant to §251(a).[46] (emphasis added.)

Further, in its Order on Rehearing dated April 13, 2005, the Public Utility Commission of Ohio ("PUCO") rejected the same arguments the Responding Parties make in this case.[47] In the PUCO case, similarly situated small rural LECs sought exemptions under Section 251(f)(1) and (2) of the Act when confronted with an arrangement between MCIMetro Access Transmission Services, LCC ("MCI"), Intermedia Communications, Inc., and Time Warner Cable Information Services (Ohio), LLC, in many respects similar to the arrangement between Sprint and MCC. The PUCO denied rehearing on the issue of whether MCI was providing telecommunications service, holding that MCI was entitled to interconnect with the rural LEC:

> The Commission denies rehearing on Applicants' fifth assignment of error. The Commission agrees with Applicants that 47 U.S.C. § 251(a)(1) and (c)(2) require Applicants to interconnect with other "telecommunications carriers" and that 47 U.S.C. §153(44) defines a "telecommunications carrier" as "any provider of telecommunications services." The Commission also observes, as do Applicants, that the 47 U.S.C. §153 definition of "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to classes of users as to be effectively available to the public, regardless of the facilities used." Applying this definition to MCI and its BFR, the Commission notes that MCI will doubtless collect a fee for providing telecommunications via interconnection with Applicants. Further, MCI's arrangements with Time Warner *will make the interconnection and services that MCI negotiates with Applicants "effectively available to the public, regardless of the facilities used."*[48] (emphasis added.)

Like MCI, Sprint will be providing interconnection, for a fee, to access the PSTN. Accordingly, the Responding Parties have a duty to interconnect with Sprint and to fulfill their obligations under Section 251(b) of the Act.

Finally, in an arbitration case between Sprint and three Illinois ILECs held after the ICC

[46] Exhibit 2 at p. 5.
[47] Exhibit 3.
[48] Exhibit 3 at p.13, ¶15.

issued its July 13, 2005 declaratory ruling, the administrative law judges in their Proposed Arbitration Decision issued on October 26, 2005[49] also expressly held that Sprint was entitled to interconnect with rural LECs, stating as follows:

> The Commission finds the record sufficiently developed to concur with Sprint and Staff that this issue is the same as that raised in Docket No. 05-0259 *et al* (cons.). Upon review of the record evidence in the current docket, the Commission sees no reason to deviate from its determination in Docket No. 05-0259 *et al* (cons.). That being said, the Commission finds that *the type of service that Sprint intends to provide in the rural exchanges supports the purposes of the Federal Act as well as the Public Utilities Act (citation omitted), and determines that this type of services is both within the legal parameters of the Federal Act and the public policy standards of introducing innovative business models for competition in the RLECs' exchanges.*[50] (Emphasis added.)

In addition to holding that Sprint was entitled to interconnection, both the ICC and the NYPSC also expressly recognized Sprint's right to reciprocal compensation. The ICC stated that "the Petitioners, as LECs, would be obligated to negotiate reciprocal compensation with Sprint if the rural exemption under §251(f)(2) is not applicable."[51] Further, the NYPSC ruled that Sprint was entitled to reciprocal compensation with the rural LECS as follows:

> We find unpersuasive the independents' claim that their §251(b) duties as local exchange carriers are not triggered because Sprint is not an ultimate provider of end user services. The provisions Sprint has offered in Section 2.4 of the proposed interconnection agreements are consistent with the §251 requirements and we find that they should prevail.[52]

As the above demonstrates, several Commissions have recognized that the law and the relevant facts supported Sprint's position, and ruled accordingly. This Commission should do the same and open the door for consumers in rural areas in Texas to choose an alternative provider. Such choice is long over due. Consolidated's sister company and Sprint have been

[49] Exhibit 4.
[50] Exhibit 4 at p. 6.
[51] Exhibit 1 at p. 13.
[52] Exhibit 2 at p. 5.

able to negotiate an agreement in Illinois to accommodate the very business model at issue in this proceeding.[53]

Sprint is confident that the various concerns Consolidated has raised can and should be resolved through an interconnection agreement between Sprint and Consolidated. In this regard, the Commission should reject Consolidated's unsubstantiated concerns. Examples include Consolidated's stated concern about "whipsawing" and the potential that "Sprint might be or claim to be ignorant of the true origin of the traffic. On the first, point Sprint is not seeking to interconnect with Consolidated for the purpose of aggregating traffic and terminating traffic. Sprint is not playing any inter-carrier compensation games unlike so many ILECs that fear real competition and have grown addicted to payments from other carriers and USF. Sprint welcomes competition and focuses on bringing consumers a competitive choice not pursuing business cases built on unsustainable subsidies in inflated access charges, regulatory arbitrage, or "whipsawing" schemes. Moreover, it should be noted that Consolidated advertises that it provides VOIP services on its web site. Consolidated could engage in whipsawing if it chose to do so, but again the point is the carriers can and should address intercarrier compensation in the interconnection agreement. The case should not be dismissed simply based on a possibility which Sprint denies in the first instance. On the second point, Sprint generates the call detail records, not the cable company. Sprint will pass the industry standard records without manipulation to the ILECs. Again, Consolidated raises an issue that simply does not exist.

IV. CONCLUSION

Congress established interconnection and reciprocal compensation obligations intending

[53] See Exhibit 5, ICC Order on Arbitration and Order Approving Interconnection Agreement.

to expand the service options available to subscribers. Adopting Consolidated's interpretation of the law would result in depriving the rural residents of this state a new offering that subscribers enjoy across the country. The rural ILECs should attempt to win those subscribers in the marketplace, rather than urging this Commission to turn the language and purpose of the Telecommunications Act on its head. Every aspect of the proposed Sprint/TWC business model makes perfect sense from a business and public policy perspective. Combining the respective resources and expertise of Sprint and TWC brings competitive choices sooner than if either entity were to deploy services alone. Sprint has successfully demonstrated that it is a Telecommunications Carrier by the express language of the Act and that the Sprint/TWC business mode serves the important pro-competitive policy objectives of the Act. Therefore, the PUCT should rule that Sprint is entitled to interconnection under §251(a) and to the rights under §251(b) and lift the abatement on each of the pending proceedings so that the interconnection issues between the parties can be resolved.

DATED this the 10th day of November, 2005.

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STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE ARBITRATION OF: SPRINT COMMUNICATIONS COMPANY L.P., Petitioning Party, vs. ACE COMMUNICATIONS GROUP, CLEAR LAKE INDEPENDENT TELEPHONE COMPANY, FARMERS MUTUAL COOPERATIVE TELEPHONE CO. OF SHELBY, FARMERS TELEPHONE COMPANY, FARMERS MUTUAL TELEPHONE COMPANY, GRAND RIVER MUTUAL TELEPHONE CORPORATION, HEART OF IOWA COMMUNICATIONS COOPERATIVE, HEARTLAND TELECOMMUNICATIONS COMPANY OF IOWA d/b/a HICKORYTECH, HUXLEY COMMUNICATIONS, IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM f/k/a GTE MIDWEST, KALONA COOPERATIVE TELEPHONE, LA PORTE CITY TELEPHONE COMPANY, LEHIGH VALLEY COOPERATIVE TELEPHONE ASSOCIATION, LOST NATION-ELWOOD TELEPHONE COMPANY, MINBURN TELECOMMUNICATIONS, INC., ROCKWELL COOPERATIVE TELEPHONE ASSOCIATION, SHARON TELEPHONE, SHELL ROCK TELEPHONE COMPANY d/b/a BEVCOMM c/o BLUE EARTH VALLEY TELEPHONE COMPANY, SOUTH CENTRAL COMMUNICATIONS, INC., SOUTH SLOPE COOPERATIVE TELEPHONE COMPANY, SWISHER TELEPHONE COMPANY, VAN BUREN TELEPHONE COMPANY, INC., VENTURA TELEPHONE COMPANY, INC., VILLISCA FARMERS TELEPHONE COMPANY, WEBSTER CALHOUN COOPERATIVE TELEPHONE ASSOCIATION, WELLMAN COOPERATIVE TELEPHONE ASSOCIATION, and WEST LIBERTY TELEPHONE COMPANY d/b/a LIBERTY COMMUNICATIONS, Responding Parties.	DOCKET NO. ARB-05-2

ORDER ON REHEARING

(Issued November 28, 2005)

INTRODUCTION

On March 31, 2005, Sprint Communications Company L.P. (Sprint) filed with the Utilities Board (Board) a petition for arbitration pursuant to 47 U.S.C. § 252, seeking an interconnection agreement with 27 rural local exchange carriers (RLECs)[1] in Iowa. The RLECs filed two motions to dismiss on April 15, 2005, arguing that Sprint was not entitled to invoke the arbitration provisions of the federal law. On May 26, 2005, the Board issued an order granting the motions and dismissing Sprint's petition. The Board found that, based on the record at that time, Sprint would not be making its services available on a common carrier basis in the exchanges at issue. As a result, Sprint was not entitled to invoke the arbitration and negotiation process under the federal act. "Order Granting Motions to Dismiss" at pages 11-17.

On June 23, 2005, Sprint filed a complaint in the United States District Court for the Southern District of Iowa,[2] asking the court to overturn the Board's decision. In the course of those proceedings, it became apparent that Sprint intended to

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[1] Ace Communications Group, Clear Lake Independent Telephone Company, Farmers Mutual Cooperative Telephone Co. of Shelby, Farmers Telephone Company, Farmers Mutual Telephone Company, Grand River Mutual Telephone Corporation, Heart of Iowa Communications Cooperative, Heartland Telecommunications Company of Iowa d/b/a HickoryTech, Huxley Communications, Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, Kalona Cooperative Telephone, La Porte City Telephone Company, Lehigh Valley Cooperative Telephone Association, Lost Nation-Elwood Telephone Company, Minburn Telecommunications, Inc., Rockwell Cooperative Telephone Association, Sharon Telephone, Shell Rock Telephone Company d/b/a BEVCOMM c/o Blue Earth Valley Telephone Company, South Central Communications, Inc., South Slope Cooperative Communications Company, Swisher Telephone Company, Van Buren Telephone Company, Inc., Ventura Telephone Company, Inc., Villisca Farmers Telephone Company, Webster Calhoun Cooperative Telephone Association, Wellman Cooperative Telephone Association, and West Liberty Telephone Company d/b/a Liberty Communications.

[2] Sprint Comm. Co. LP v. IUB, Case No. 4:05-CV-00354 (S.D. Iowa 2005).

introduce evidence in the court proceedings that Sprint had not presented to the Board. In the same general time frame, public utility commissions in other states were considering similar evidence and concluding that in similar circumstances Sprint would be a telecommunications service provider.[3] Accordingly, Sprint and the Board stipulated to a remand of the court proceedings to allow the Board to review the previously-unseen evidence and arguments and reconsider its May 26, 2005, order. On August 18, 2005, the Court approved a 60-day remand for that purpose.

On October 17, 2005, the Court granted a joint motion of the parties to extend the remand to November 21, 2005.

The major issue at this time is whether Sprint's proposed activities in the RLEC exchanges will support a finding that Sprint will be a "common carrier" in those exchanges. If so, then Sprint will be a "telecommunications service provider" (as defined in 47 USC § 153) and is therefore entitled to invoke the arbitration process under the federal act. If the Board finds that Sprint meets the test, then the arbitration proceedings will be resumed at the stage where they were terminated, with approximately 79 days left.

Determining whether a carrier is a "common carrier," as opposed to a private carrier or contract carrier, requires application of a two-pronged test that can be summarized as follows:

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[3] See, e.g., Cambridge Telephone Co., et al., Docket Nos. 05-0529, et al., "Final Order" (Illinois Commerce Commission, July 13, 2005) (Rehearing denied August 23, 2005); Petition of Sprint Comm. Co. L.P. for Arbitration, "Order Resolving Arbitration Issues," Cases 05-C-0170 and 05-C-0183 (New York Public Service Commission, May 24, 2005).

1. Does the carrier hold itself out to serve all potential users indifferently?

2. Does the carrier allow customers to transmit intelligence of their own design and choosing?

NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976). The first prong was further clarified in United States Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002), by noting that a carrier that offers its service only to a defined class of customers can still be considered a common carrier if it holds itself out to serve all within that class indiscriminately. The focus of this proceeding is on the first factor; there is no dispute in this record that Sprint does not regulate or alter the content of the messages it transmits.

Regarding the first factor, Sprint's position is that "as long as Sprint offers its services indiscriminately to entities that are capable of providing their own last mile facilities; [sic] it may enter into separate agreements with users and maintain its status as a common carrier." (Sprint Prehearing Brief at p. 15.) In other words, Sprint argues that as long as it is willing to provide interconnection services to any cable television company (or anyone else with last-mile facilities), it is a common carrier, even if it negotiates individual, confidential contracts with each such entity.

Sprint also argues that it is a telecommunications service provider because it will indirectly offer service "to that subset of the general public consisting of customers of MCC [MCC Telephony Services of Iowa, Inc.] and other similarly situated competitive service providers that utilize Sprint's service... ." (Sprint Prehearing Brief at p. 8.) In other words, Sprint argues that it can establish its own

status based on the fact that MCC will serve the public indiscriminately and Sprint will be serving MCC. The RLECs argue that this proves too much, since the same argument would make every supplier that MCC deals with into a telecommunications service provider.

The RLECs point out that they have expressed their willingness to negotiate with MCC, or with Sprint as agent for MCC, but Sprint has refused to negotiate in any capacity other than in its own name. The RLECs appear to be suspicious of this approach and insist they have a right to an interconnection agreement with the competitive local exchange carrier (CLEC) that will actually be offering retail service to the public, this is, with MCC.

Board member Stamp previously was an attorney with the law firm which is representing Sprint in this matter. However, during his time with the firm as it pertains to this matter, Board member Stamp did not do any work for Sprint, was not involved in counseling or advising Sprint, and was not privy to any confidential information involving Sprint. After reviewing the relevant professional codes, General Counsel has advised Board member Stamp that he may participate in the decision-making in this docket.

SUMMARY OF THE POSITIONS OF THE PARTIES

A. Sprint's evidence

To provide voice service, Sprint provides the switching, the public switched telephone network (PSTN) interconnectivity including all intercarrier compensation,

numbering resources and porting, toll service, operator and directory assistance, 911 circuits, and numerous back-office functions. (Transcript of hearing of October 18, 2005, at p. 22, hereinafter referred to as "Tr. 22.") In this case, it is MCC that provides the last-mile functions to the customer premise, sales, billing, customer service, and installation. (Id.) Sprint uses this business model to provide competitive telephone service to over 500,000 customers in 13 states. (Tr. 23.) Carriers such as MCI use this same business model in six other states. (Id.)

Neither Sprint nor MCC is the agent of the other party. (Id.) Each company has independent obligations under its contract to provide specific parts of the network. The business model capitalizes on the resources and capabilities of both companies to allow market entry sooner than if either company were to attempt to do it alone. (Tr. 24.)

Although this business model is not the only way to provide competitive facilities-based telephone service, it is a legitimate business model that qualifies for interconnection under the Act, according to Sprint. The Act gives competitive LECs three options for providing service: 1) self-provisioning, 2) resale, or 3) leasing unbundled network elements from an ILEC. New entrants may also employ a combined approach where one carrier provides some of the facilities necessary to provide service and other carriers provide other parts of the network. The Act also requires all LECs, including CLECs, to resell their services to other competitors. In